UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN

UNITED RENTALS HIGHWAY TECHNOLOGIES, Inc.
Employer

and Case 13-RC-21460

TEAMSTERS LOCAL UNION No. 731
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on March 7, 2006, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[1]

I. ISSUES

This petition raises the following issues: 1) whether the unit petitioned-for which includes dock workers is appropriate; 2) whether employees who have been laid off have a reasonable expectation of recall and thus are eligible voters; and 3) whether the four lead employees constitute supervisors as defined by Section 2(11) of the Act and therefore are ineligible to vote.

II. DECISION

For the reasons discussed in detail below, and because the unit sought herein represents a residual group of employees, I shall direct that the employees described below shall be allowed to vote in a self-determination election to decide whether they wish to be included in the already existing unit represented by Petitioner:

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[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organization involved claim to represent certain employees of the Employers.

d. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

> All full-time and regular part-time yardmen, manufacturing, shipping and receiving, lamination, and utility employees employed by the Employer at its facility currently located at Villa Park, Illinois; but excluding all office clerical employees and guards, professional employees and supervisors as defined by the Act.

Additionally, based upon the record evidence, I make the following findings:

1. The four lead employees, Garcia, Lopez, Andrade, and Reyes, do not satisfy the supervisory criteria as defined by Section 2(11) of the Act and therefore are eligible to vote in the election.
2. The employees currently on layoff but not invited to participate in the Employer's "Mandatory Seasonal Leave of Absence" program do not possess a reasonable expectation of recall and therefore are ineligible to vote.

III. STATEMENT OF FACTS

A. Overview

The Employer, United Rentals Highway Technologies, is in the business of providing construction barricades as well as marking and striping of pavement in construction zones and other traffic sites. United Rentals Highway Technologies is part of a larger entity, United Rentals, a heavy equipment rental company that operates in the United States, Canada, and Mexico. Within that larger company of United Rentals, the United Rentals Highway Technologies division constitutes approximately eight percent of the total company size.

This petition concerns the United Rentals Highway Technologies facility in Villa Park, Illinois. Physically speaking, the Villa Park location is divided into two departments by a wall—on the north side of the wall is the manufacturing side of the business and on the south side of the building is the operations side. On the manufacturing side, the assembly of many of the items used and sold occurs.

Currently, the Petitioner, Teamsters Local 731 represents traffic safety workers, daily rental, contract installation, mechanical service, shoring, shielding and road plate delivery, crew leaders and permanent marking employees. All of these employees currently work on the operations side of the business which constitutes approximately 40 employees.

The Petitioner now seeks to represent the remainder of the Employer's workforce. The unit as petitioned for includes all full time and regular part time yardmen, manufacturing, shipping and receiving, lamination, and utility employees. These employees, with the exception of the dock workers, work on the north side of the facility. In terms of daily functions, the laminators affix reflective sheeting to construction barricades and signs. In the sign shop, employees print the legends to the reflective sheeting once it is affixed. In the barricade department, employees assemble parts to create the actual barricade which is then either sold or rented to customers. In the shipping and receiving department, employees distribute the product as well as doing janitorial work and repairing broken equipment.

In terms of supervision, Patrick Flood supervises the department of operations whereas Brent Finley is the supervisor over all manufacturing employees. Both Finley and Flood report

to District Manager Mike Solomon, who is also currently serving as Branch Manager at Villa Park.

IV. DISCUSSION

A. Residual Unit

As mentioned, the Union currently represents a unit of traffic safety workers, daily rental, contract installation, mechanical service, shoring, shielding and road plate delivery, crew leaders and permanent marking employees for which there is a collective bargaining agreement. The Union now seeks a separate unit comprised of the remainder of the Employer's workforce, excluding office clericals, managers, and supervisors.

Where group of employees has been left out of an established bargaining unit, the Board has found such units constitute appropriate residual units, provided they include all of the unrepresented employees. *Fleming Foods*, 313 NLRB 948 (1994). In these situations, the Board requires that all unrepresented employees residual to an existing unit or units be included in an election to represent them on a residual basis. *The Armstrong Rubber Co.*, 144 NLRB 1115, 1119, fn. (1963); *St. John's Hospital*, 307 NLRB 767, 768 (1992); *Budd Co*, 154 NLRB 421 (1965).

Although the petition seeks to represent the dockworkers and the employees in the manufacturing department separately, at the hearing the Petitioner expressed a willingness to proceed to an election in any unit found appropriate. Therefore, in accordance with Board policy concerning inclusion of unrepresented groups, I find that the petitioned-for unit should be given the opportunity by a self-determination election to express their desires with respect to being included in the existing unit represented by the Petitioner.

If a majority of the employees in that group cast their votes for the Petitioner, they will have indicated their desire to be a part of the existing unit currently represented by the Petitioner, and the Petitioner may bargain for such employees as part of that unit. If the employees indicate they do not wish to be represented by the Petitioner, they shall remain unrepresented. *Kansas City Terminal Elevator Co.*, 269 NLRB 350 (1984); *Arizona Public Service Co.*, 310 NLRB 477 (1993).

B. Expectation of Recall of Laid Off Employees

To be eligible to vote, a laid-off employee must have a reasonable expectation of recall in the near future as of the payroll eligibility period. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). In determining whether employees have a reasonable expectation of recall, the Board examines several factors, including what the employees were told about the likelihood of recall, the circumstances surrounding the layoff, and the employer's past experience and future plans. *Id.*

The Board has found that employees have a reasonable expectation of recall when they are told they could expect to be recalled "whenever work picked up." *Atlas Metal Spinning Co.,* 266 NLRB 180 (1983). However in contrast, when layoffs occur as part of a general long-term downsizing of an Employer's work force this weighs against a reasonable expectation of recall. *Monroe Auto Equipment,* 273 NLRB 103, 106 (1984). Additionally, when there is no estimate given to employees as to the duration of their layoff or any specific indication as to when, if at all, they would be recalled, this does not satisfy the standard regarding a reasonable expectation of recall. *Tomodur, Inc.,* 196 NLRB 706, 707 (1972); cf. *Aero Metal Forms,* 310 NLRB 397, 410 (1993). Lastly, if employees are told they should find other employment or apply for unemployment, this also tends to indicate they do not have a reasonable expectation of recall. *Osram Sylvania, Inc.,* 325 NLRB 758, 760 (1998).

Here, record evidence suggests that in 2004 and 2005, there were nine branches closed or sold within the United Technologies Division. To address losses at the Villa Park location specifically, cost-saving strategies such as lowering inventory and altering some manufacturing processes were implemented. These changes resulted in a staff reduction of approximately nine employees.

In addition, alterations were made to the method by which the Employer laid off employees. In late 2005 and early 2006, the Employer offered 15 employees a "Mandatory Seasonal Leave of Absence" (hereafter "MSLOA") to those believed to be the most productive and thereby continued to pay health insurance contributions if employees also continued with their employee contributions. According to the Employer, those eight employees who were not offered MSLOA were considered to be terminated. This layoff and termination plan represented a change from prior years in that the Employer had previously laid off and recalled employees by seniority when business picked up.

The eight employees who were not offered MSLOA received a letter saying that "due to a reduction in workforce, you have been laid off." These letters indicated that employees would be paid through the end of their vacation time and that following that "[i]t will not be necessary for you to return to work after your vacation." While the letter fell short of calling their layoff a "termination," employees were notified by letter that they should seek alternate employment and/or unemployment benefits.

Given the language of the letter which gives no duration to their "layoff" and instructs them to take an enclosed form to the Unemployment Office, this tends to indicate a lack of a reasonable expectation of recall. In combination with the general downturn in the Employer's business as evidenced by the nine office closures and cost-saving mechanisms implemented at the Villa Park facility, including the processes which eliminated much of the work previously performed, this is further evidence of a lack of a reasonable belief in the expectancy of recall.

By contrast, those who were offered MSLOA did have a reasonable expectation of recall. During the time of their "seasonal leave of absence" they continued to receive company benefits. In their letter, they were encouraged to contact the office about "any questions regarding payment while on leave" which also tends to weigh in favor of their reasonable expectation of recall.

Based upon the record evidence therefore, I conclude that those employees currently on lay off status are ineligible to vote but those who were offered and are currently under a Mandatory Seasonal Leave of Absence are eligible to vote.

C. Voter Eligibility of Lead Employees

The issue of the supervisory authority of four lead employees—Jose Reyes, Eziquiel Garcia, Roberto Andrade, and Serafin Lopez—was raised by the Employer at the hearing. It is well documented that individuals who possess and exercise sufficient authority to be supervisors within the meaning of Section 2(11) of the Act, are ineligible to be represented by a labor organization and thus are ineligible to vote in an election.

As set forth in Section 2(11), the term "supervisor" is defined as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The Board has held that the party seeking to prove supervisory status has the burden of proof. *Clark Machine Corp.,* 308 NLRB 555 (1992).

The Board has found that it has a duty not to construe the statutory language too broadly because any individual found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). "In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, set-up men and other minor supervisory employees.'" *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. *Id.*, at 1689. A key indicia of supervisory status is the ability to hire and fire. *Darbar Indian Restaurant,* 288 NLRB 545, 551 (1988).

a) Supervisory Authority of Garcia

Garcia is the lead of the dock employees. He performs the same work as the other employees on the dock. He is also in charge of distributing daily work assignments and is the "point person" for employees to call if they are not able to come to work. The record reflects evidence that in the past Garcia has complimented employees if they did a good job, or has similarly communicated to them when they did poor work. Garcia's observations occasionally get communicated to Garcia's Supervisor, Mr. Flood, but the record is unclear whether Garcia's recommendations result in any official action taken or if so, how many times. In terms of Garcia's perceived authority to employees, there was testimony from one employee that he believed Garcia to be "the person in charge of the dock." Garcia is not however vested with the authority to hire or fire.

b) Supervisory Authority of Andrade, Lopez and Reyes

Record evidence indicates that like Garcia, Andrade, Reyes, and Lopez do not possess the authority to hire or fire. There is minimal evidence that these individuals may have the authority to recommend discipline but the record reflects is silent as to whether Andrade and Lopez have ever chosen to exercise that right, while Reyes admitted he has never recommended discipline. The record also reflects that all four individuals perform the same work as bargaining unit

employees. On the manufacturing side, Reyes works in the barricade department; Lopez is the lead for lamination; and Andrade is the lead in shipping and receiving. In that area, each lead serves to pull out the applicable materials and getting the process started by assigning the individual employees to perform the job.

In addition to those duties, Reyes often translates the directions of his superior, Dan Conway, which includes communicating his work assignments. Reyes also helps employees fix things, helps an employee correct work done incorrectly, and generally keeps workers busy by bringing them material. Reyes, however did not send employees home early, and did not discipline or sit in on disciplinary proceedings. He was not consulted on which employees should be kept on staff, which should be awarded the MSLOA layoff, and which should be terminated. He was entrusted with a set of keys to the facility until his termination. Unlike Garcia, Reyes was not the "point person" that employees called when they were not able to work due to illness. He also has the same 401(K) and insurance benefits as the dockworkers currently have.

The record is inconclusive on the daily interactions of Andrade and Lopez with respect to any supervisory indicia not specifically mentioned. Therefore, there was no evidence regarding the call-in procedures in the shipping and receiving or lamination departments. There was no evidence regarding whether Andrade or Lopez were entrusted with keys to the facility. Similarly there is no information about whether either of these individuals were consulted about which employees were top performers in their departments and therefore should be kept on staff, which should be awarded MSLOA layoff, or which should be terminated.

As far as their salary and benefits as compared to other employees, there also is no evidence to differentiate Andrade and Lopez from employees in the shipping and receiving or lamination departments.

c) Conclusion

Based upon the evidence presented, it is the opinion of the undersigned that the Employer failed to satisfy its burden of proving the supervisory authority of the four lead employees at issue. As mentioned, none of them have the authority to hire or fire. There was no evidence of them transferring, suspending, laying off, recalling, or promoting employees. While there is some evidence that the four leads do assign work during the shift when orders are received and then keep workers supplied with materials so they can continue working, there was no evidence of any of the four individuals acting to reward employees for a job well done, or any specific evidence of independently disciplining other employees for poor performance. There was no evidence presented regarding the adjustment of any of individual grievances, or any effective recommendation to do so. Their assignment of work even appeared to lack in independent judgment. In Reyes' case for example, the record reflected that he was merely communicating the wishes of Dan Conway rather than acting independently.

There was no evidence regarding the delineation of these leads in terms of benefits or pay. Even among the lead employees, they themselves did not see themselves as supervisors but merely as "helpers" of their supervisors. Only one employee testified that he believed Garcia to be "in charge" of the dock.

Given the routine nature of the four leads daily activities and the distinct lack of "genuine managerial prerogative" it is the opinion of the undersigned that Garcia, Andrea, Lopez and

Reyes do not possess the indicia of supervisory authority specified in Section 2(11) of the Act. They are therefore eligible to vote.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of intent to conduct election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off, as defined by this decision. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition in any economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikes who have been permanently replaced as well as their replacements are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and the employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local Union No. 731 or no labor organization.

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this

Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election, but only upon the Petitioner's indication that it wishes to proceed to an election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or before **Friday, April 7, 2006.** No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street. N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 14, 2006.

DATED at Chicago, Illinois this 31st day of March 2006.

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Roberto G. Chavarry
Regional Director
National Labor Relations Board
Region Thirteen
209 S. LaSalle Street, Suite 900
Chicago, Illinois 60604

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420-7384
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